

**UNITED STATES DISTRICT COURT
IN THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

BRIAN ERNST,

Petitioner

v.

NATHANIEL QUARTERMAN,

DIRECTOR TDCJ-ID,

Respondent

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Civil No. CC-07-217

ORDER DISMISSING PETITION FOR HABEAS CORPUS RELIEF

Petitioner is currently serving a mandatory life sentence for a 2006 aggravated kidnaping conviction. The sentence was enhanced by his prior 2002 conviction for indecency with a child. Petitioner's direct appeal of the aggravated kidnaping sentence is currently pending before the Thirteenth Court of Appeals of Texas.

In June 2006, Petitioner filed a state writ application challenging the indecency with a child judgment. On February 14, 2007, The Texas Court of Criminal Appeals denied the application without written order.

On May 10, 2007, Petitioner filed this federal application for habeas relief. He lists the aggravated kidnaping conviction as the judgment for which he is confined. Petitioner claims the indecency with a child conviction is void based on double jeopardy principles. He argues the court's use of that conviction to enhance his sentence in the kidnaping case violates his due process rights.

Respondent's motion for summary judgment argues that Petitioner's challenge to the aggravated kidnaping judgment is unexhausted, procedurally barred, and without merit. The United States Magistrate Judge recommends the motion be granted in part and denied in part (D.E. 21). Specifically, she recommends the Court dismiss Petitioner's application for writ of habeas corpus without prejudice for failure to exhaust state court remedies. She also recommends the Court not address Respondent's other arguments until Petitioner has fully exhausted his claim in state court. Petitioner did not file objections. The Court regards such omission as Petitioner's agreement with and acceptance of the Magistrate Judge's findings.

The Court finds no clear error in the Magistrate Judge's memorandum. *Guillory v. PPG Industries, Inc.*, 434 F.3d 303, 308 (5th Cir. 2005) (citing *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1420 (5th Cir. 1996)). Petitioner has not presented the Texas Court of Criminal Appeals with a challenge to the aggravated kidnaping judgment. In his state habeas action, he only challenged the indecency with a child conviction. Petitioner's appeal of the aggravated kidnaping judgment is currently pending before the Thirteenth Court of Appeals of Texas, and Petitioner still has the right to challenge the conviction in a state habeas action. As such, the Court finds Petitioner has failed to exhaust his state court remedies.

The Court adopts the findings and conclusions of the Magistrate Judge. Respondent's motion for summary judgment is GRANTED in part and DENIED in part (D.E. 5). Petitioner's application for habeas corpus relief is DISMISSED without prejudice. Should

Petitioner request a certificate of appealability, it is DENIED.

ORDERED this 20 day of March, 2008.

A handwritten signature in black ink, appearing to read "Hayden Head", written over a horizontal line.

HAYDEN HEAD
CHIEF JUDGE